

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

Original Affidavit of Mailing

74-1530

To be argued by
ETHAN LEVIN-EPSTEIN

B

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-1530

UNITED STATES OF AMERICA,

Appellee,

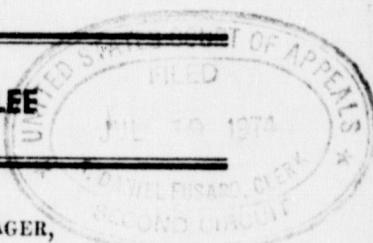
—against—

PATRICK J. McDONOUGH,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE



DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

KENNETH J. KAPLAN,
ETHAN LEVIN-EPSTEIN,
Assistant United States Attorneys,
Of Counsel.

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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1530

UNITED STATES OF AMERICA,

Appellee,

—against—

PATRICK J. McDONOUGH,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant Patrick J. McDonough appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Edward R. Neaher, *J.*) entered on April 19, 1974, after a non-jury trial, which judgment convicted appellant of knowingly possessing (Count One) and uttering (Count Two) three \$10.00 Federal Reserve Notes, in violation of Title 18 United States Code, § 472. Appellant was sentenced to a term imprisonment for three years. This sentence was suspended and appellant was placed on probation for a period of three years.

On this appeal, the sole issue presented is whether the case should be remanded for a hearing to determine if the Government has complied with the Prompt Disposition Rules.

Statement of Facts

On May 14, 1973, appellant was arrested by agents of the United States Secret Service and charged with uttering three counterfeit ten dollar Federal Reserve Notes. He was arraigned that day before the U.S. Magistrate in the Eastern District of New York, and released on a \$1,000 personal recognizance bond. At the time of his arrest and arraignment, appellant provided his address as 121 Newbridge Road, Hicksville, L.I.

On June 8, 1973 the appellant waived a preliminary hearing. An indictment was filed with the Clerk of the Court on October 30, 1973.

On October 31, 1973 a "Notice of Pleading" was mailed to the appellant at the aforesaid address. The notice informed him that he was required to appear before the Honorable Edward R. Neaher, United States District Judge, on November 9, 1973 to enter his plea to the indictment.* On November 5, 1973, the "Notice of Pleading," in its original envelope, was returned to the Office of the United States Attorney by the United States Postal Service, with a stamped notation that there was no one at that address by the name of "Patrick J. McDonough."

On November 9, 1973, counsel for the Government and the appellant appeared before Judge Neaher for pleading. Appellant failed to appear. A bench warrant was issued, with execution stayed until November 13, at the request of defense counsel.

On November 14, 1973, the appellant appeared in Court and entered a plea of not guilty to the indictment. A "Notice of Readiness For Trial" was filed on November

* Counsel for appellant, the Legal Aid Society, was also notified by mail of the November 9th pleading date.

19, 1973, six months and five days subsequent to appellant's arrest.

The case was called for trial on January 14, 1974. Appellant's attorney moved to dismiss the indictment on the ground that the Government had not complied with the Second Circuit for Prompt Disposition of Criminal Cases, by not having filed a Notice of Readiness within the six-month period following his arrest. The Court denied the motion without a hearing.

Appellant proceeded to trial, without a jury, and was convicted on both counts of the indictment.

DISCUSSION

The Government Consents To A Remand Of The Case For A Hearing To Determine If The Government Complied With the Prompt Disposition Rules.

Appellant's motion to dismiss the indictment under the Prompt Disposition Rules was denied by the District Court after hearing argument by both the Government and the defense.*

However, the Government recognizes that this Court, in numerous decisions, has required the District Court to conduct a hearing and make specific findings of fact. See, *United States v. Furey*, -- F.2d —, Second Circuit Doc. No. 74 — 1410 (July 2, 1974); *United States v. Bowman*,

* The Assistant United States Attorney submitted an affidavit setting forth the excludable periods pursuant to Rule 5 of the Prompt Disposition Rules—one period in which appellant agreed to cooperate and another where the appellant was unavailable (November 9, 1973 to November 14, 1973).

493 F.2d 594 (2d Cir. 1974); *United States v. Valot*, 481 F.2d 22 (2d Cir. 1974); *United States v. Rollins*, 475 F.2d 1108 (2d Cir. 1973); *United States v. Scafo*, 470 F.2d 748 (2d Cir. 1972).

The Government, therefore, consents to a remand of the instant case for a hearing to determine if the Government complied with the Prompt Disposition Rules.

CONCLUSION

It is respectfully submitted that this case should be remanded for a hearing to determine if the Government has complied with the Prompt Disposition Rules.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

KENNETH J. KAPLAN,
ETHAN LEVIN-EPSTEIN,
Assistant United States Attorneys,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

----- DEBORAH AMUNDSEN, being duly sworn, says that on the 19th day of July 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ax two copies of the brief of the appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services Unit
606 U. S. Court House
Foley Square
New York, New York 10007

Sworn to before me this

19th day of July 1974

Sylvia E. Morris
SYLVIA E. MORRIS
Notary Public, State of New York

No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 1975

Deborah J. Amundsen
DEBORAH J. AMUNDSEN

SIR:

PLEASE TAKE NOTICE that the within
will be presented for settlement and signature
to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the _____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

, 19

Action No.

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

United States Attorney,
Attorney for

To:

Attorney for

SIR:

PLEASE TAKE NOTICE that the within
is a true copy of _____ duly entered
herein on the _____ day of _____

, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,

Dated: Brooklyn, New York,

, 19

United States Attorney,
Attorney for

To:

Attorney for

United States Attorney,
Attorney for
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within
is hereby admitted.

Dated: _____, 19

Attorney for